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joining the faculty at Georgetown, she served as Special Litigation Counsel to the Civil Rights Division of the U.S. Justice Department and an attorney with the U.S. Equal Employment Opportunity Commission. She is also well-known for her academic work in sex discrimination law in the United States. Professor Ross will share with us insights from the clinical work she directs in Africa, in which treaty compliance has formed the basis for both legislative reform and test-case litigation in women's human rights.

Third, Navraj Singh Ghaleigh is Lecturer in Public Law at the University of Edinburgh. Formerly, Mr. Ghaleigh was a barrister in London and Lecturer at King's College London. He undertook his graduate work at the University of Cambridge, the European University Institute (Florence), and the University of California at Berkeley as a Fulbright scholar. He will speak about his work in the European Union on legal responses to climate change involving international, regional, and national bodies.

Fourth, Arnold Zack, currently serves as President of the Asian Development Bank Administrative Tribunal. Judge Zack is a well-known labor arbitrator and mediator. He is affiliated with Harvard Law School's Labor and Worklife Program, where he is a Lecturer on Designing and Managing Dispute Resolution Systems. He is the author of 12 books on union management issues, internationally and in the United States. Judge Zack will speak to us this morning about the International Labor Organization's role in labor standards compliance and dispute resolution through arbitration.

Iterative Engagements: The European Union and International Normativity

By Navraj Singh Ghaleigh[*]

The process of internalizing international norms into domestic law is a matter of contention in all polities, to varying degrees of intensity. Harold Koh's provocative thesis of transnational norm generation—of nation-state and transnational private actors blending national and international legal processes such that international norms are internalized into domestic law—is considerably less provocative in the European Union than in its country of origin. Whereas public international law can elsewhere be seen principally as a constraint on independent action, the European Union has frequently deployed it as an instrument for the advancement of European integration. As such, the process of ''translation'' is less a matter of hypothetical speculation in the European Union than a known mode of legal and political activity. Commencing with some brief stage-setting, this short paper will analyze two separate bodies of international legal norms—those pertaining to anthropogenic climate change, and business and human rights—and argues that in the EU context at least, ''translation'' is best seen as one part of a highly iterative process of dynamic relations between levels.

The broad receptiveness[1] of the European Union to translating international legal norms into domestic ones derives in part from the fact that the European Union is itself a creation of public international law. Its foundational milestones are marked by international treaties which ''member states have drawn up in order to create and define the *tools* of their European co-operation . . . international law has provided, from the start and until now, the legal

[*] Lecturer in Public Law, Edinburgh Law School, University of Edinburgh.

[1] The qualification highlights the sometime problematic relationship between international and European law—see *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, E.C.R I-6351 (2008), and its voluminous attendant literature.

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instruments needed for the *overall organisation* of European integration.''[2] These treaties (of Rome, Maastricht, Lisbon, and so on) serve to advance a variety of internal development needs of the European Union, but they also drive its external influence—''[the] EU actively seeks to export a particular set of internal legal rules to third countries by means of a bilateral or multilateral agreement, thereby 'projecting the *acquis.*'''[3] In this respect, the European Union adopts the role of what Koh would recognize as a ''governmental norm sponsor,'' commonly in concert with civil society ''norm entrepreneurs.'' Indeed, the European Union describes itself as an ''emerging . . . global rule maker.''[4]

Global climate change regulation is a policy area in which the European Union regards itself as a successful norm sponsor, with its greenhouse gas emissions trading scheme (''EU ETS'') as a flagship legal instrument.[5] However, this policy area has been characterized equally by the European Union's successes and failures regarding norm entrepreneurship. It is worth recalling that the deployment of market mechanisms to redress the externality of greenhouse gas emissions issued from U.S. proposals at the third Conference of the Parties of the UNFCCC in 1997, in the face of strong opposition from the European Union.[6] The European Union had traditionally harbored suspicions toward market-based approaches to environmental regulations, preferring so-called ''command and control'' mechanisms such as ''best available technology'' or ambient standards. However, that debate was lost by the European Union at the Conference of the Parties with the result that the agreement struck, the Kyoto Protocol, has become a byword for market-based approaches to environmental regulation. In these terms, therefore, the United States proved itself to be the telling ''rule generator,'' not the European Union, with its ability to demonstrate the success of its own SOx/NOx markets as the decisive factor.[7] Lest this be considered an instance overtaken by events, it should be recalled that at the 2009 Copenhagen Conference of the Parties, the United States again proved to be the decisive Annex I actor.[8]

In these terms, the European Union might be better described as a climate change ''loser'' rather than a ''reference point in third countries as well as in global and regional fora.''[9] However, such a judgment would fail to account for the European Union's post-1997 Damascene conversion to the gospel of the markets, which in turn helped establish itself as the dominant player in the global carbon market. The EU ETS's share of the global carbon market in 2008 was approximately $92 billion, ''accounted for by transactions of allowances and derivatives under the [EU ETS] for compliance, risk management, arbitrage, raising cash and profit-taking purposes,'' from a total transacted value of $126 billion.[10] The second largest element of the market is the secondary market for CERs (the units of the Kyoto Protocol's CDM), whose transactions for 2008 amounted to a mere $26 billion. Even in this global market, firms subject to the *acquis communautaire* dominate. Of the 2,517 CDM

[2] Bruno de Witte, *International Law as a Tool for the European Union*, 5 EUR. CONST. L. REV. 265–83, 266 (2009).

[3] *Id.* at 278. The term ''*acquis communautaire*'' refers to the accumulated body of EU law.

[4] *Id.* at 278, n.42.

[5] Navraj Singh Ghaleigh, *Emissions Trading Before the European Court of Justice: Market Making in Luxembourg*, *in* LEGAL ASPECTS OF CARBON TRADING: KYOTO, COPENHAGEN AND BEYOND (David Freestone & Charlotte Streck eds., 2009).

[6] Navraj Singh Ghaleigh, *Anti-Americanism and the Environment*, *in* 1 ANTI-AMERICANISM: HISTORY, CAUSES, THEMES 139 (Brendan O'Connor ed., 2007).

[7] *Id.*

[8] Mark Landler & Helene Cooper, *After a Bitter Campaign, Forging an Alliance*, N.Y. TIMES, Mar. 18, 2010.

[9] De Witte, *supra* note 2, at 278.

[10] WORLD BANK, STATE AND TRENDS OF THE CARBON MARKET 2009, at 1 (2009).

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projects recognized by the CDM Executive Board, in 2,284 (91%) instances the Designated Operational Entity is a European enterprise, as are 87% of investor parties (figures arrived at by searching the CDM site).

As noted elsewhere, ''[t]he EU ETS's trading volumes dwarf those of its rivals none of which has a volume equal to even 1% of the EU ETS. The Scheme's position of primacy will remain unchallenged unless and until a federal US scheme is established.''[11] At the time of this writing, a U.S. federal scheme[12] again seems a dim prospect and even the most ambitious version of the current legislative proposals (3% emission reduction by 2020 against a 1990 baseline) fails to generate emission reductions even close to the levels achieved by the EU ETS (20% emission reductions by 2020 against a 1990 baseline, possibly rising to 30%), limiting their potential share of the global carbon market.

The importance of the European Union's dominance of carbon markets may appear from the foregoing to be substantially a matter of market power, but this fact, of course, has normative implications. To take but one, as emissions trading schemes proliferate (and they do), policymakers desire that they ''link'' to one another to generate liquidity and other market goods. Such linking ''depends on the respective compatibility of the underlying emissions trading scheme [in terms of] the equivalence of requirements for participating sectors . . . and procedural aspects such as monitoring, reporting, verification, and enforcement.''[13] Reconciling the inevitable differences between schemes ''is not primarily a task for lawyers, but an inherently political assignment,''[14] and insofar as that is the case, the overwhelming market power of the EU ETS would allow the European Union substantially to dictate terms to those wishing to link to it. In this way, the European Union would not be compelling other nations to translate international (UNFCCC) norms into their domestic law, so much as deploying market dominance to persuade them to internalize particular (EU) *interpretations* of them into their domestic law. Such normative influence as the European Union may wield in this realm stems not from its ability to determine treaty negotiations, but from its successful response to the conditions created thereby—a case of losing the war but winning the peace.

The second policy area for consideration is the nascent international legal regime pertaining to transnational corporations and human rights. As is well known, the gap between the operational capacities of transnational corporations (TNCs) and the regulatory reach of states has grown steadily. This in turn has generated a plethora of regulatory responses of which the United Nations' draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (''Draft Norms'') are the best known.[15] Grounded in ambitious and contentious principles of the direct application of human rights norms to TNCs, the Draft Norms project was abandoned amid claims of subversion of accepted notions of sovereignty and state responsibility, although the baton was carried forward by the appointment in 2005 of Professor John Ruggie as the Secretary General's

[11] Ghaleigh, *supra* note 5, at 367.

[12] David Freestone & David Frenkil, *Emissions Trading in the US: A New Regime Approaching?*, VII Eur. Energy L. Rep. 75–94 (2010).

[13] Michael Mehling, *Linking of Emissions Trading Schemes*, *in* Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond, *supra* note 5, at 110–11.

[14] *Id.* at 133.

[15] UN Doc. E/CN.4/Sub.2/2003/L.8 (Aug. 7, 2003).

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Special Representative for Human Rights and Business (''SGSR'').[16] The approach of the SGSR, which has focused not on the notion of direct obligation of TNCs but, rather, on the legal obligations issuing from states and those obligations that directly affect corporations under traditional conceptions of law, was first articulated comprehensively in ''Protect, Respect and Remedy: A Framework for Business and Human Rights.''[17] This ''synthesis'' report identified three overlapping principles: the state duty to protect, the corporate responsibility to respect, and access to remedies—the details and implications of which are too numerous and complex for treatment here. Rather, the response of the EU will be briefly outlined.

In 2009 the European Commission (Directorate-General for Enterprise and Industry) commissioned a study to analyze the existing legal framework for human rights and the environment applicable to European enterprises operating outside the European Union, with a view to contributing to the further operationalization of the UN Framework (undertaken by this author and colleagues at Edinburgh Law School). The study complements the UN Framework in focusing on European law and member state law applicable to European enterprises operating outside the European Union and reaches beyond it by considering environmental law in addition to human rights law.[18] In so doing, the study *inter alia* identifies opportunities for the European Union and its member states to contribute to the operationalization of the UN Framework from a European perspective. The study team is assisted by regular meetings with a Commission-selected ''stakeholder committee'' (composed of representatives from the major EU trade associations, industry groups, trade unions, and environmental and human rights pressure groups—Koh's ''transnational norm entrepreneurs'') and discussions with the office of the SGSR itself.

In evidence is something beyond a predilection of the European Union to receive international norms with open arms. What is noteworthy is the early engagement of the ''UN Framework'' by the European Union—the attempt not merely to understand its own relationship to it and compliance ability, but also the determination to promote its own substantive regime as the Framework evolves towards its final form, due in April 2011. This is not construing national law to comply with international legal standards, or an example of international law which is ''downloaded'' (to use Koh's term) into national law but, rather, an attempt to ''upload'' EU law and legal policy preferences into the international legal development process.

Whereas the climate law example is one of the European Union adapting to an international regime (the architecture of which was avowedly not of its choosing), the response to the ''UN Framework'' is an attempt to shape the regime at its earliest stages of development. In both cases though, and as in other policy areas,[19] EU engagement in international lawmaking is structured to export the European Union's own models of law where possible (because they are believed to be best, to avoid the need for internal adaptation, to promote the international identity of the European Union, etc.) and where not, to adapt to international norms so as to be able to shape the future regime iteratively. As Koh argues, ''through

[16] The abandonment of the Draft Norms project and subsequent work of Ruggie has been criticized in this publication. David Weissbrodt, *UN Perspectives on Business and Humanitarian and Human Rights Obligations*, 100 ASIL PROC. 135 (2006).

[17] UN Doc. A/HRC/8/5 (Apr. 7, 2008) (''UN Framework'').

[18] Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the EU, *available at* http://tinyurl.com/6hx4pm2.

[19] Gráinne de Búrca, *The EU In The Negotiations of the Disability Convention*, EUR. L. REV. (forthcoming 2010).

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repeated cycles of 'interaction-interpretation-internalization,' interpretations of applicable global norms are eventually internalized into states' domestic legal systems.''[20]

The International Labor Organization and the Translation of International Norms into Domestic Law

By Arnold M. Zack[*]

Inherent in the title of this panel is the recognition that what we tend to embrace as substantive international law is, in reality, a set of international norms or standards adopted by public international organizations empowered by treaty agreements among member states. Those public international institutions possess organs and structures distinct from those of their member states and transform those norms into the law of those under its international jurisdiction. The question before us is the extent to which those norms or organizational laws come to be accepted as standards to be followed by national governments and other players. Some players are global in reach, such as the FAO or UN or ILO, while others are regional in impact such as EBRD or the OAS.

In addition to the substantive international norms, of course, there are also procedural norms and standards adopted by these organizations, which likewise may have their impact on domestic law and on the standards followed by players in the global arena. These procedural norms evolve from diverse national concepts of justice and fairness, as well as our subconscious perceptions of fairness; are embraced and molded by the international organizations as they develop substantive norms; and become an essential ingredient in developing domestic law and the law of international organizations. Both common-law and code societies share many of the elements which evolve into what we have come to accept as the rule of law to guide those who follow international substantive norms.

In my particular area of interest—workplace fairness—the International Labor Organization is the international entity which, since 1919, has been the architect and initiator of international norms for the world's workplaces. Its tripartite structure composed of worker, government, and employer representatives from each member nation has been the vehicle that has enabled it to establish consensus for workplace norms within its member delegations. Through their adoption by its 183 member countries, this has resulted in the promulgation of 180 ILO Conventions.

When ratified by a member state, an ILO Convention gains the status of national law. Unfortunately, not all nations that have ratified ILO conventions live up to their commitments. Governments that have blithely ratified all ILO conventions may still be guilty of gross violations of a wide range of workplace protections. Others, including the United States, have tended to conform to the ideals of the Conventions, even though lagging in having ratified them. The United States has ratified only two of the eight Core or Fundamental Human Rights Conventions. We have not ratified one of two prohibiting forced labor and one of two prohibiting child labor, or the conventions guaranteeing freedom of association and the right to collective bargaining. However, despite this sorry record, even when not fully adopted into national law by member states, the ILO conventions have come to be recognized as the universal goal for providing a decent work environment.

[20] Harold H. Koh, *Why Transnational Law Matters*, 24 Penn St. Int'l Rev. 745 (2006).

[*] President, Administrative Tribunal of the Asian Development Bank.

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